

FILED

DEC 17 2014

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREW S. ANDERSEN,
Plaintiff,

v.

WILLIAM J. WILSON, et. al.,
Defendants.

No. C 12-05297 BLF (PR)

**ORDER OF PARTIAL DISMISSAL
AND OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
INSTRUCTIONS TO CLERK**

Plaintiff, a state prisoner, filed the instant civil rights action in *pro se* pursuant to 42 U.S.C. § 1983, challenging conditions of confinement while at Correctional Training Facility (“CTF”) in Soledad.¹ Plaintiff’s amended complaint is now before the Court for an initial review. (Docket No. 45.)

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

¹This matter was reassigned to this Court on April 17, 2014.

1 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify
 2 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
 3 claim upon which relief may be granted or seek monetary relief from a defendant who is
 4 immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must, however, be
 5 liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
 6 1988).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 8 elements: (1) that a right secured by the Constitution or laws of the United States was
 9 violated, and (2) that the alleged violation was committed by a person acting under the
 10 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

11 **B. Plaintiff's Claims**

12 Having reviewed the amended complaint, the Court finds that Plaintiff's
 13 allegations, liberally construed, state a cognizable First Amendment retaliation claim
 14 against Defendants Wilson, Esparza, Dunstan, Frudden, Lusk, Wynn and Spearman based
 15 on their actions related to bringing false charges against Plaintiff as part of a conspiracy
 16 to punish him for filing a group inmate appeal against Defendant Wilson. *See Rhodes v.*
 17 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). Plaintiff's claim that Defendants'
 18 actions impinged on his First Amendment right to free speech is also cognizable. *See*
 19 *Shaw v. Murphy*, 532 U. S. 223, 229 (2001) (citing *Turner v. Safley*, 482 U.S. 78, 89
 20 (1987)).

21 Plaintiff's claim that Defendants intentionally or negligently lost his personal
 22 property, the claims relating to the loss of his job and wages, and his allegations that
 23 Defendants' interfered with his rehabilitation were already dismissed by the Court in an
 24 "Order of Partial Dismissal and Service" filed on October 30, 2013. (*See* Docket No. 5 at
 25 2-3.) For the same reasons discussed therein, those claims are DISMISSED without leave
 26 to amend from this action. (*Id.*)

27 The Court will exercise supplemental jurisdiction over Plaintiff's state law claims.
 28 *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

1 **CONCLUSION**

2 For the reasons stated above, the Court orders as follows:

3 1. The Clerk of the Court shall mail a copy of the amended complaint,
4 (Docket No. 45), all attachments thereto, and a copy of this order upon counsel for
5 Defendants Wilson, Esparza, Dunstan, Frudden, Lusk, Wynn and Spearman.

6 The Clerk shall terminate all other Defendants from the Docket.

7 2. No later than **ninety (90) days** from the date of this order, Defendants shall
8 file a motion for summary judgment or other dispositive motion with respect to the claims
9 in the amended complaint found to be cognizable above.

10 a. Any motion for summary judgment shall be supported by adequate
11 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
12 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
13 qualified immunity found, if material facts are in dispute. If any Defendant is of the
14 opinion that this case cannot be resolved by summary judgment, he shall so inform the
15 Court prior to the date the summary judgment motion is due.

16 b. **In the event Defendants file a motion for summary judgment, the**
17 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
18 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
19 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

20 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
21 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
22 motion is filed.

23 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure
24 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary
25 judgment must come forward with evidence showing triable issues of material fact on
26 every essential element of his claim). Plaintiff is cautioned that failure to file an
27 opposition to Defendants' motion for summary judgment may be deemed to be a consent
28 by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff

1 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam);
2 *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

3 4. Defendants *shall* file a reply brief no later than **fourteen (14) days** after
4 Plaintiff's opposition is filed.

5 5. The motion shall be deemed submitted as of the date the reply brief is due.
6 No hearing will be held on the motion unless the Court so orders at a later date.

7 6. All communications by the Plaintiff with the Court must be served on
8 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
9 copy of the document to Defendants or Defendants' counsel.

10 7. Discovery may be taken in accordance with the Federal Rules of Civil
11 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
12 Local Rule 16-1 is required before the parties may conduct discovery.

13 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
14 court informed of any change of address and must comply with the court's orders in a
15 timely fashion. Failure to do so may result in the dismissal of this action for failure to
16 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

17 9. Extensions of time must be filed no later than the deadline sought to be
18 extended and must be accompanied by a showing of good cause.

19 **IT IS SO ORDERED.**

20
21 DATED: Dec 17, 2014


BETH LABSON FREEMAN
United States District Judge